

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SECOND APPEAL No. 87 of 1999****For Approval and Signature:****HONOURABLE MR.JUSTICE KS JHAVERI**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
MAKARANI JANMAHMAD ISMAIL - Defendant(s)

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Appearance :

GOVERNMENT PLEADER for Appellant(s) : 1,
None for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI**Date : 20/07/2007****ORAL JUDGMENT**

1. The appellant State, by way of filing present Second Appeal under Sec.100 of the Code of Civil Procedure,

1908, has challenged the legality, validity and propriety of the judgment and decree dtd.31/12/1998 passed by the learned District Judge, Junagadh in Regular Civil Appeal No.3 of 1993, whereby the learned District Judge has dismissed the appeal confirming the judgment and decree dtd.8/5/1992, passed by the learned Civil Judge (S.D.) in Regular Civil Suit No.386 of 1989, whereupon correction made by the State Government pursuant to the representation made by the original plaintiff in view of the orders passed by the Mamlatdar and Collector Exh.Nos.29 and 30, respectively, were declared to be null and void and the original plaintiff - respondent herein, was allowed to continue in service from 30/6/1989 and he was granted back wages for the period between 1/10/1987 to 30/6/1989.

2. Short facts for disposal of the present appeal are that the respondent was appointed as part-time Kotwal in 1959, and as he was appointed as part time Kotval, there was no question of entering the date of birth of the appellant. However, in 1979, in view of the orders passed by the Government, the services of the respondent was regularized as full time employee in class-IV cadre and

since then, the respondent was in service.

2.1.The respondent challenged the action of the appellant State seeking him to retire by telephonic message and the action of the appellant of treating the respondent as full-time Kotval since 1979 only. According to the case of the respondent, his services should be considered continuous from 1959 i.e from the date of his appointment and is entitled to the retiral benefits accordingly. According to the respondent, the appellant did not send the respondent before the Civil Surgeon for verification of the age of the respondent.

2.2.The respondent received notice dtd.17/7.1987 alleging that in the affidavit dtd.14/12/1981, respondent has changed the date of birth from 9/6/1929 to 11/11/1923 and no supporting evidence was produced by the respondent along with his affidavit. As per the say of the respondent, the affidavit was in accordance with the orders passed by the appellant and the same was accepted by the appellant way back in 1981.

2.3.The respondent along with other similarly situated

employees, was referred to Civil Surgeon, Junagadh by Mamlatdar and the Civil Surgeon issued certificate assessing 58 years' age of the respondent on 13/8/1987. Inspite of these facts, the appellant opened the chapter of the date of birth of the respondent and change the date of birth of the respondent against the medical opinion.

2.4. According to the respondent, as the respondent completed complete 58 years on 13/8/1987, he would be entitled to continue in service till 31/8/1989 with all benefits.

2.5. The respondent instituted Regular Civil Suit No.3 of 1993 in the Court of learned Civil Judge (SD), Veraval for declaration and permanent injunction. The learned Civil Judge framed the issues and after hearing the advocates for the parties and considering the evidence, oral so also documentary, decreed the suit vide judgment dtd.8/5/1992 declaring the order Ex.29 and 30 passed by the Mamlatdar, Veraval and order Exh.20 passed by the Collector, Junagadh, as null and void and quashed the same. It is also held that the original plaintiff - respondent herein be continued on duty till 30/6/1989 and is entitled to all back wages, and other benefits admissible to the said post till

30/6/1989 and pensionary benefits.

3. The aforesaid judgment and decree passed by the learned Civil Judge in favour of the respondent herein, was challenged by the appellant State before the learned District Judge, Junagadh by filing Regular Civil Appeal No.3 of 1993. The learned District Judge, after hearing both the sides and considering evidence on record, dismissed the appeal preferred by the appellant herein confirming the judgment and decree passed by the learned Civil Judge, against which the appellant - State has preferred this appeal.

4. Learned Assistant Government Pleader for the State has tried to argue that the impugned order is not legal, but he is not in a position to controvert the fact that before passing the order, neither the required procedure was followed nor the appellant was given an opportunity of being heard. Learned Assistant Government Pleader has fairly conceded that the respondent has changed the date from 9/6/1929, the date mentioned by the appellant in his affidavit, to 11/11/1923, without giving an opportunity and directed him to retire on and from 8/6/1987, without

giving an opportunity of being heard.

5. It is the case of the respondent that the impugned judgement and decree is just, legal and proper, as before changing the date of the respondent, the appellant has not given any opportunity to the respondent and without following required procedure, the appellant has changed the date of birth the respondent, that too, against the medical evidence. It is also submitted that once the date of birth is accepted by the appellant, the appellant cannot be permitted to change the date of birth of the respondent after inordinate delay, that too against the medical evidence. It is also submitted the case of the respondent that even otherwise present appeal is filed against the concurrent judgements of the court below and therefore, appeal may be dismissed.

6. I have heard the learned counsel for the parties at length and have also perused the documents produced before me. Both the courts below have set aside the order of the Mamlatdar and Collector and the question of conclusive proof is out of question, since no required procedure is not followed by the appellant and the

respondent has accepted the subsequent development. In that view of the matter, the contentions raised by the appellant regarding date of birth of the appellant is misconceived.

6.1. Further, the contention was not raised by the appellant before the court below and the appellant cannot take this court by surprise by taking the contention which was not take before the court below, that too without the permission of this Court. It is the duty of the appellant to inform this court that said contention was not raised before the court below and for raising the plea, the appellant was required to take permission of this Court. The appellant cannot be permitted to raise a plea for the first time in the High Court, that too, in Second Appeal. Even otherwise, before making change in the date of birth of the respondent, the respondent was not heard.

7. The Division Bench of this Hon'ble Court (Coram : B.J. Diwan and P.D. Desai, JJ) has held that "If an employee is not in a position to perform his duty due to an illegal order passed against him, the period of his absence from duty due to that illegal order, may be considered as the

period spent on duty. But if due to an illegal order, an employee restrained from service and applies for leave just to save himself from the consequences of departmental inquiry in case he fails to get it set aside the order challenged by him, in that case, he can not be said to have spent the period on duty. But if any order is challenged by the Government employee and he is not in a position to perform his duty due to illegal order till the illegal order is set aside, in that case, the employee concerned is held to be on duty during that period.”

8. The court below have given cogent and convincing reasons while passing the impugned order. I find no reason to interfere in the impugned order. When the retrenchment is held to be invalid, then the workman is entitled to back wages and the grant of back wages is a rule, denial is exception. No evidence is led by the employer – appellant herein, that the respondent workman was gainfully employed anywhere. Therefore, the order awarding back wages is also in consonance with the evidence on record and do not call for any interference.

8.1. Even otherwise, present appeal has been preferred against concurrent orders of the courts below and there is no error much less error of law apparent on the face of the record. I do not find any reason for interference at the hands of this Court. I accordingly answer both the questions in favour of the respondent.

9. The appeal deserves to and is accordingly dismissed. Interim relief, if any, is vacated. No costs.

(K.S. Jhaveri, J.)

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